No. 91-311

# In the Supreme Court of the United States

**October Term, 1991**

RAYMOND MIRELES,

*Petitioner,*

*v.*

HOWARD WACO,

*Respondent.*

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner RAYMOND MIRELES hereby submits his reply to the Brief in Opposition to Petition for Writ of Certiorari filed by Respondent HOWARD WACO.

### INTRODUCTION

WACO's brief in opposition concedes the determinative issue is whether MIRELES acted in the complete absence of jurisdiction. By so doing, WACO acknowledges Petitioner's reason for grant based on the conflict between the Ninth Circuit opinion in this case and *Stump v. Sparkman*, 435 U.S. 349 [98 S.Ct. 1099, 55 L.Ed.2d 331] (1978) is compelling. WACO's ensuing attempt to avoid the reasoned result of this concession by relying upon the allegations of his complaint fails. He further concedes that the solitary authority he cites to support this position, *Gregory v. Thompson*, 500

F.2d 59 (CA9 1974), did not hold conclusory allegations may abrogate judicial immunity. Instead, *Gregory* recognized that even a judge who personally used physical force would be entitled to qualified immunity absent an actual determination by a trier of fact that malice existed. *Id.* at 65. Consequently, in light of the rules of pleading adopted in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 [102 S.Ct. 2727, 73 L.Ed.2d 396] (1982), WACO's allegations of "excessive force" cannot provide a basis on which to justify the Ninth Circuit opinion. Moreover, assuming, without conceding, the conclusory allegations of the complaint may be deemed to overcome judicial immunity in any form, WACO entirely fails to explain how the conduct he asserts MIRELES engaged in could have been under color of state law so as to constitute a violation of 42 U.S.C. § 1983.

Similarly, WACO's effort to answer the petition's reasons for grant by asserting the authority relied upon includes no case which holds a judge enjoys immunity when he directs the use of excessive force begs the question. The authority relied upon in the petition is the controlling law which sets forth the parameters of the doctrine of judicial immunity. When those guidelines are applied to the instant case and the opinion issued by the Ninth Circuit, it becomes apparent the decision reached by that court is impermissibly in conflict with the applicable case law of this Court as well as the decision of the Fourth Circuit in *Mullins v. Oakley*, 437 F.2d 1217 (CA4 1971). *Mullins*, contrary to WACO's suggestion no such authority exists, expressly holds a judge is absolutely immune where he orders counsel to be brought before him forcibly. *Id.* at 1217-18.



## ARGUMENT

### I.

### WACO MAY NOT RELY ON HIS LEGALLY INSUFFICIENT ALLEGATIONS TO DEFEAT JUDICIAL IMMUNITY.

Relying on *Gregory*, *supra*, 500 F.2d at p. 59, WACO blatantly recites that the sole legal justification for the Ninth Circuit opinion is found in his conclusory allegations of excessive force. Not only is such an approach contrary to law; it finds no support in *Gregory* and, in fact, conflicts with that case. WACO argues his allegations are to be accepted uncritically by the court. While it is accurate to state allegations are to be accepted as true at the pleading stage, that general rule does not respond to the relevant inquiry of whether the allegations are sufficient. Such is particularly the case where the issue is immunity under 42 U.S.C. § 1983.

The Ninth Circuit opinion indulges in the same error of law WACO urges here. The brief per curium opinion permitted WACO to proceed with his 1983 action against Judge MIRELES without considering that court's jurisdiction to make the order complained of or employing a functional approach to determine whether his acts were judicial in character as required by this court's decision in *Forrester v. White*, 484 U.S. 219, 227-28 [108 S.Ct. 538, 98 L.Ed.2d 555] (1988). The opinion simply recites the judge "lost" his absolute immunity and cites *Gregory* (App. A 2-3) without discussing whether the judge was entitled to qualified immunity. The Ninth Circuit did so despite the fact that *Gregory* recognized a judge who personally used physical force would be entitled to qualified immunity and only affirmed the verdict after observing the jury found actual malice. *Gregory*, *supra*, 500 F.2d at 64-65. *Gregory* made no determination as to the sufficiency of allegations to support a claim such as that asserted by WACO. To the contrary, by acknowledging qualified immunity applied under the

circumstances of that case, the *Gregory* court placed in issue this Court's requirement of specificity in pleading of claims subject to the qualified immunity defense. Given the conclusory allegations of WACO's complaint, had the circuit court proceeded to apply the doctrine of qualified immunity as required by case law, the controlling authority dictates WACO's claim be dismissed.

Recognizing the policy of enabling federal courts to dismiss meritless claims against governmental officials at the earliest possible stage of litigation, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 [102 S.Ct. 2727, 73 L.Ed.2d 396] (1982) adopted the test to be applied to the pleading of claims subject to the qualified immunity defense. That policy was reaffirmed in *Anderson v. Creighton*, 483 U.S. 635, 645 [107 S.Ct. 3034, 97 L.Ed.2d 523] (1987). In the words of this Court in *Harlow*, "bare allegations of malice should not be enough to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, *supra*, 457 U.S. at 817-18; cf. *Siegert v. Gilley*, ___ U.S. ___ [111 S.Ct. 1789, 1795, 114 L.Ed.2d 277] (1991) (Kennedy, J., concurring). In order to survive a motion to dismiss where qualified immunity is in issue, a plaintiff must plead nonconclusory allegations setting forth specific evidence of unlawful intent. *Branch v. Tunnell*, 937 F.2d 1382, 1386 (CA9 1991).

A look at WACO's allegations demonstrates they are merely conclusory, totally insufficient and cannot be construed to plead specific facts or evidence. The complaint fails to allege any particular violation of any specific right clearly established under the fourth, sixth or fourteenth amendments to the United States Constitution as required by *Harlow* and *Siegert*. Further, no facts whatever are alleged as to the manner in which any violation of any constitutional amendment occurred. *Harlow*, *supra*, 457 U.S. at 818; *Siegert*, *supra*, 111 S.Ct. at 1794. Nor are there specific facts alleged as to any conduct on the part of Judge MIRELES. The complaint avers only that the officers were ordered to use "excessive force," no more than a subjectively descriptive conclusion.



The only other reference to the judge's conduct is recitation of the legal conclusion MIRELES "ratified" the officers' actions without reference to any fact to support it. The only allegations of force which even purport to set forth facts are confined to the officers. Pursuant to *Harlow* and *Siegert*, as applied in *Branch*, such conclusory allegations set forth no specific facts sufficient to survive a motion to dismiss.

The heightened pleading standard from the qualified immunity context of *Harlow* and its progeny is even more essential to pleading of claims which call into issue the defense of absolute judicial immunity. To hold otherwise would render absolute judicial immunity for acts of a judge within his jurisdiction conditional and abrogate the very policies which are the bases of that doctrine.

## II.

## WERE ONE TO ASSUME WACO'S ALLEGATIONS SUFFICIENT TO OVERCOME JUDICIAL IMMUNITY AT THE PLEADING STAGE, WACO HAS NOT PRESENTED, AND CANNOT PRESENT, ANY BASIS ON WHICH TO CONCLUDE SUCH ALLEGATIONS STATE A CLAIM FOR VIOLATION OF 42 U.S.C. §1983.

WACO's entire argument that MIRELES may not avail himself of the defense of absolute judicial immunity is premised upon the proposition that the judge acted in the clear absence of all jurisdiction. This same proposition is the basis on which WACO defends the Ninth Circuit opinion. Yet, it is this proposition which provides still an added reason for grant of the petition which is made apparent by WACO's brief in opposition. By virtue of the Ninth Circuit's holding and its conclusion that WACO has stated a claim for violation of 42 U.S.C. § 1983, the Ninth Circuit has determined Judge MIRELES acted under color of state law though he acted in the clear absence of all jurisdiction. Thus, the opinion

presents an important question of federal law which has not been, but should be decided by this Court.

This Court's landmark judicial immunity case *Stump v. Sparkman*, *supra*, 435 U.S. 349 left open the question of whether a judge who acted without any jurisdiction whatsoever and was, therefore, not entitled to immunity could meet the under color of law requirement for suit under section 1983. *Id.* at 360, 369 n. 6 (Stewart, J., dissenting). The leading cases of this court which have dealt with the "under color of law" requirement have primarily involved the conduct of police officers. *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1962); *Screws v. United States*, 325 U.S. 91 [65 S.Ct. 1031, 89 L.Ed. 1495] (1945); *United States v. Classic*, 313 U.S. 299 [61 S.Ct. 1031, 85 L.Ed. 1368] (1941). Those cases have held that officers acting pursuant to their assigned duties were acting under color of law even though they violated certain state statutes because they were "clothed with the authority of state law." *Monroe v. Pape*, *supra*, 365 U.S. at 184, quoting *United States v. Classic*, 313 U.S. 299, 326 [61 S.Ct. 1031, 85 L.Ed. 1368] (1941).

However, the question of absolute judicial immunity requires a somewhat different analysis. If one posits that, as WACO argues, MIRELES did not have absolute judicial immunity, his immunity was abrogated because he acted in the clear absence of jurisdiction, entirely without authority. Thus, by definition, the judge was not possessed of any power "by virtue of state law" when he made his order, was not "clothed with the authority" of the state, and did not act "under color of" any law. This situation is entirely distinct from that of police officers addressed in this Court's prior "under color of law" cases. Absolute judicial immunity, unlike the immunity accorded police officers, is unrelated to state of mind or good faith and is singularly dependent upon jurisdiction even where the judge acts with malice. *Stump*, *supra*, 435 U.S. at 356; see *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 370 (CA9 1981).



Judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger v. Sanner*, 474 U.S. 193, 199 [106 S.Ct. 496, 88 L.Ed.2d 507] (1985) (quoting *Bradley*, *supra*, 13 Wall. at 347); see *Ashelman v. Pope*, 793 F.2d 1072, 1075 (CA9 1986). By contrast police officers only have immunity where they can demonstrate they acted in good faith. *Pierson v. Ray*, 386 U.S. 547 [87 S.Ct. 1213, 18 L.Ed.2d 288] (1967). As to judicial officers, contrary to police officers, absolute immunity creates two mutually exclusive categories. There can be no intermediate or gray area in which a judge may avail himself of a demonstration of good faith. Either a judge acts pursuant to his authority and is absolutely immune from suit under 1983, regardless of his state of mind, or he acts outside his authority and is not acting under color of law as required to state a claim pursuant to 1983. These categories of judicial conduct are mutually exclusive. In either case, WACO cannot state a claim against Judge MIRELES[1]

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[1]That this question of federal law presented by the Ninth Circuit opinion requires analysis and resolution by this Court is exemplified by the circumstance that each circuit opinion which involves a potential section 1983 claim against a judge necessarily decides this issue. Yet, no decision of this Court provides guidance to the circuits. Consequently, when the Seventh Circuit addressed the issue in *Lopez v. Vanderwater*, 620 F.2d 1229, 1236-37 (CA7 1980) and held a judge who acted entirely without jurisdiction was still acting under color of law for purposes of 1983, it stated it failed to recognize any reason to differentiate between judges and police officers in applying the color of law requirement. *Id.* at 1237. This conclusion without explanation totally ignores the differences between absolute judicial immunity and the limited good faith immunity accorded police officers.

## III.

## WACO CONTINUES TO MISREAD THE AUTHORITY WHICH GOVERNS THIS CASE.

While citing the barest of facts from the relevant cases the opposition brief analyzes none of them and, in fact, fails to address the determinative rulings of the two leading cases on absolute judicial immunity, ***Bradley v. Fisher***, 13 Wall. 335 [20 L.Ed. 646] (1872) and *Stump v. Sparkman*, *supra*, 435 U.S. 349. In both cases this Court unambiguously held the relevant inquiry in determining absolute judicial immunity is whether the judge acted in the clear absence of all jurisdiction regardless of his state of mind. However, the opposition brief completely ignores this threshold question characterizing *Stump* as a "general" rule not particularly applicable to this case. (Opp. Brf. pp. 5-6). Instead, WACO relies on the wholly distinguishable case of *Gregory v. Thompson*, *supra*, 500 F.2d 59 without responding to the reasoned discussion of its inapplicability to the instant case set forth in the petition and reflected in this Court's citation of it in *Stump*.

WACO's citation to *Zarcone v. Perry*, 572 F.2d 52 (CA2 1978) is also inapt. In *Zarcone*, unlike this case, the judge acted without jurisdiction because there was no actual case pending before him regarding the vendor he demanded be brought before him to be chastised for the quality of his coffee. The judge in *Zarcone* did not attempt to invoke the doctrine of judicial immunity. *Id.* at 53.

Similarly, WACO's claim the merits of the petition are in some manner disposed of since it does not cite to a case in which absolute judicial immunity has been accorded to a judge who has allegedly ordered the use of force is inefficacious. Assuming such an inquiry were relevant to the issues before this Court, such authority does exist in the Fourth Circuit. *Mullins v. Oakley*, *supra*, 437 F.2d 1217. The *Mullins* case thereby directly pits the Fourth Circuit



against the Ninth in light of its opinion in this case. In *Mullins* the complaint alleged a judge had ordered his bailiff to "forcibly" bring the plaintiff, an attorney who was in another courtroom, into the defendant judge's court. The judge then allegedly used "vile and slanderous" language against the attorney. *Id.* at 1217-18. The district court dismissed the complaint against the judge and the court of appeals affirmed. It held the judge was immune from suit under 42 U.S.C. § 1983 for both the alleged force and foul language. The court explicitly stated the centuries-old rule that "a judge may not be attacked for exercising his judicial authority, even if done improperly." *Id.* at 1218. That is the rule this Court relied on in *Stump*; it is the rule which applies here, and it is the rule disregarded by the Ninth Circuit opinion.

## IV.

## CONCLUSION

During the twelve years since this Court has addressed the doctrine of absolute judicial immunity in the context of 42 U.S.C. § 1983 in *Stump v. Sparkman*, *supra*, 435 U.S. 349, it has had occasion to analyze and refine the concept of judicial immunity in other contexts. Those cases instruct that the threshold consideration to determine whether a judge's acts are judicial and the proper subject of absolute immunity requires a functional approach. *Forrester v. White*, 484 U.S. 219 [108 S.Ct. 538, 98 L.Ed.2d 555] (1988). Yet, this Court's case law is silent as to this evolution of the judicial immunity analysis in cases subject to absolute judicial immunity. The law of judicial immunity as a whole may only be uniform, consistent and effectively applied by the circuit courts with direction as to the approach those courts are to employ.

Moreover, as the arguments of this reply and the original petition demonstrate, the Ninth Circuit's opinion misapplies the judicial immunity analysis prescribed by this Court. Consequently, the Ninth Circuit opinion directly conflicts with the rule of both *Stump* and *Bradley v. Fisher*, 13 Wall.

335 [20 L.Ed. 646] (1872). That misapplication also creates a conflict among the circuits on the issue of whether a judge who is alleged to have ordered an attorney into his court on a matter pending before him is immune from suit if the complaint asserts the order directed the use of force despite the heightened pleading standard of judicial immunity cases.

Furthermore, if it is determined a judge's conduct is judicial in character and subsequent analysis reveals that judicial function was exercised in the complete absence of all jurisdiction, the question becomes whether such conduct is under color of state law to justify an action under 42 U.S.C. § 1983. However, neither this court nor any circuit court has considered the issue of color of state law in cases which involve absolute judicial immunity.

Respectfully submitted,

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## PROOF OF SERVICE BY MAIL

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*ss.*

*County of Los Angeles*

I, the undersigned say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 27, 1991, I served the within *Reply To Brief In Opposition To Petition For Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 27, 1991, at Los Angeles, California.

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*(Original signed)*